Supreme Court, U.S.
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No. 95-77 JUL 13 1995

In The Supreme Court Of The United States

October Term, 1994

Thomas G. Botchie,
Petitioner,

v.

Michael O'Dowd, The Sheriff of Charleston County, and the Retirement Division of the State of South Carolina Budget and Control Board,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina

PETITION FOR WRIT OF CERTIORARI

Gregg Meyers*
Wise & Cole, P.A.
P.O. Drawer O
Charleston, SC 29402
803/727-2200

N. Steven Steinert
15 Broad Street
Charleston, SC 29401
803/723-1199

Attorneys for Petitioner Thomas Botchie
*Counsel of Record
July, 1995

Questions Presented

Whether, under a proper application of Waters v. Churchill, and Connick v. Myers, a public employee, found to have engaged in speech protected by the First Amendment for which he claims he was fired, can have his claim dismissed upon directed verdict:

a. without the factfinder determining whether the speech was the reason the employee was terminated?

b. when the court applied the Connick balancing test not to the protected speech but to conduct the employee claims never occurred and is a pretext for his firing? Or

c. when no evidence is offered to show that the protected speech in any way disrupted the public employment?

Table of Contents

Page

Questions Presented i

Table of Authorities 3

Opinions Below 6

Jurisdiction 7

Constitutional and Statutory Provisions Involved 9

Statement of the Case 9

Reasons for Granting the Petition 19

1. The State Court's analysis precludes the factfinder where facts are disputed, conflicts with Waters v. Churchill, and isolates constitutional analysis from fact ... 20
   a. Waters requires the factfinder resolve the reason for discharge when it is disputed 25
   b. No deference is due this employment decision 31

2. Lower courts are uncertain how to sequence the fact inquiries and the legal issues . 32

3. The questions presented are important 36

Conclusion..... 37

Appendices 38

A. The opinion sought to be reviewed 38

B. Order on rehearing ... 46

C. Transcript of the directed verdict decision in the trial court 48

Table of Authorities

Cases

Pages

Botchie v. O'Dowd, 299 S.C. 329, 384 S.E.2d 727 (S.C. 1989) (Botchie 1), ... 7

Botchie v. O'Dowd, ___ S.C. ___, 432 S.E.2d 458 (1993) (Botchie 2) 7, 13, 16, 23

Botchie v. O'Dowd, ___ S.C. ___, 456 S.E.2d 403 (S.C. 1995) (Botchie 3) 6, 8, 18, 28, 29, 34, 37

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) .. i, 18, 21, 24, 25, 26, 28, 29, 30, 33, 34, 35

Dacus v. Johnston, 180 S.C. 329, 185 S.E. 491 (1936) 26

Feldman v. Philadelphia Housing Authority, 43 F.3d 823 (3rd Cir. 1994) 33

Hearon v. Calus, 178 S.C. 381, 183 S.E. 13 (1935) 26

Hudson v. Louisiana, 450 U.S. 40, 101 S.C. 970, 67 L.Ed.2d 30 (1981) 35

Jones v. Dodson, 727 F.2d 1329 (4th Cir. 1984) 22

Joyner v. Lancaster, 815 F.2d 20 (4th Cir. 1987) 27

Limbach v. Hooven & Allison Co., 466 U.S. 353, 104 S.Ct. 1837, 80 L.Ed.2d 356 (1984) 35

Marciello v. Sumner, 973 F.2d 295 (4th Cir. 1992), cert.den. sub nom. Marciello v. City of Lancaster, ___ U.S. ___, 113 S.Ct. 1048, 122 L.Ed.2d 356 (1993) 27

Marshall v. Porter County Plan Com'n, 32 F.3d 1215 (7th Cir. 1994) 33, 34

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed 2d 1215 (1982) 36

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) 21, 22, 26

Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974) 36

Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) 21, 23

Schiller v. Moore, 30 F.3d 1281 (10th Cir. 1994) 34, 35

State v. Siegler, 230 S.C. 115, 94 S.E. 2d 231 (1956) 26

Torres v. Aponte Roque, 831 F.2d 26 (1st Cir. 1987) 27

Waters v. Churchill, ___ U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) .. i,

18, 19, 20, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35

William E Arnold Co. v. Carpenters District Council, 417 U.S. 12, 94 S.Ct. 2069, 40 L.Ed.2d 620 (1974) 36

Wright v. Illinois Dept. Children & Family Services, 40 F.3d 1492 (7th Cir. 1994) 34

Constitution and Statutes

U.S. Const. Amend. I ..... i, 8, 9

28 U.S.C. § 1257(a) 8

42 U.S.C. § 1983 ..... 9, 16

Other Authorities

Tribe, American Constitutional Law (2d Ed. 1988) 27

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1994

Thomas G. Botchie,
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v.

Michael O'Dowd, Sheriff of Charleston County, and the Retirement Division of the State of South Carolina Budget and Control Board,
Respondents.

Petition for a Writ of Certiorari
to the Supreme Court of the
State of South Carolina

Thomas G. Botchie respectfully petitions for a writ of certiorari to review a judgment of the Supreme Court of South Carolina.

Opinions Below

The opinion of the South Carolina Supreme Court is reported at ___ S.C. ___, 456 S.E.2d 403 (S.C. 1995).

Related opinions of that court are reported as Botchie v. O'Dowd, 299 S.C. 329, 384 S.E.2d 727 (S.C. 1989) (Botchie 1); and Botchie v. O'Dowd, ___ S.C. ___, 432 S.E.2d 458 (S.C. 1993) (Botchie 2).[1]

Jurisdiction

This appeal concerns an opinion issued April 3, 1995, by the South

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[1] Botchie 1 reversed summary judgment holding that the Sheriff could not be sued even for unconstitutional conduct if related to a personnel action. Constitutional issues weren't reached. Botchie 2 reversed directed verdict at the close of the plaintiff's case. The Sheriff was required to offer evidence of actual disruption from the protected speech.

Carolina Supreme Court, Botchie v. O'Dowd, 456 S.E.2d 403 (S.C. 1995). A Petition for Rehearing was timely filed and was denied on April 19. Id.. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), in that the court of last resort in South Carolina has rendered a final judgment respecting the Freedom of Speech guaranty of the First Amendment. The federal question involved is substantial and, as the central issue, was necessarily decided in the state proceedings. The initial pleadings sought relief for termination from public employment based on constitutionally protected speech. No adequate nonfederal grounds support the state court ruling.

Constitutional and Statutory Provisions Involved

The First Amendment provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,

and 42 U.S.C. § 1983, which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ....

Statement of the Case

This case challenges on Constitutional grounds a South Carolina sheriff's decision to fire a deputy.

In 1987 Petitioner Thomas Botchie

was the highest ranking Deputy Sheriff in Charleston County, South Carolina, at a time when the Sheriff's office was not the County's main crime fighting force, but instead served the Court system by keeping order in various county courts, transporting prisoners to trial, serving court papers, and assisting tax collections. (The County Police Department patrolled the streets). The Sheriff's office was closed on weekends.

In late October, 1987 the elected Sheriff died of a heart attack, and in November the Governor appointed as "interim" Sheriff the unsuccessful Republican candidate for the office from the 1984 election. That Interim Sheriff was Michael O'Dowd, a former subordinate of Botchie's when each served as police officers. O'Dowd took office Friday,

November 6, 1987, and a special election to fill the remaining two years of the unexpired term was scheduled for February, 1988. O'Dowd described it as "a very political atmosphere and a very political situation."

Because O'Dowd had once been Botchie's subordinate, and because O'Dowd claimed to have had a report, which Botchie denied and no other witness substantiated, that Botchie "became enraged and threw furniture around in the office" when O'Dowd was appointed, before taking office O'Dowd checked with Botchie to see if Botchie had any problems serving under O'Dowd. Botchie told the Interim Sheriff he did not have any problem doing so, and would support him 100%. O'Dowd told Botchie he could remain a Deputy.

In O'Dowd's first week he had little interaction with Botchie and no disruptions. As noted, the Sheriff's office was closed on weekends. During their second week together, Botchie was assigned a function which took him out of the office the entire week. It was Botchie's only assignment from O'Dowd, and Botchie performed it so well he received a letter of appreciation for his effort. Botchie had no contact with O'Dowd after that assignment began, and he went on vacation, from Friday, November 20 to December 2.

During his vacation Botchie travelled by car to Boston, and had neither contact with O'Dowd, communication with the office, nor any information about local events. Botchie knew nothing about others who announced

as candidates to oppose O'Dowd for the February, 1988 special election.[2]

The morning of Wednesday, December 2, 1987, Botchie returned to work from his vacation. O'Dowd called him into his office and fired him. Why O'Dowd did that is disputed, although it is the law of the case that Botchie had engaged in protected speech. Botchie 2, 432 S.E.2d at 461.

Before his vacation, while working out of the office on his assignment from O'Dowd, Botchie had chanced upon an acquaintance who asked him, during a "minute or two" conversation, to work actively for the Republican Party, O'Dowd's party. Botchie declined the invitation, explaining he had lost

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[2] O'Dowd was defeated in that election.

confidence in the Republican Party because two state legislators had not been truthful about their role in the process by which the Interim Sheriff was selected. Since Botchie had often run the office when the elected Sheriff was absent, after the Sheriff died Botchie mentioned to the two legislators he was willing to serve as Interim Sheriff.

Botchie had been on military recall in 1984 when the last Sheriff election had been held. Botchie is apolitical and had more than once declined invitations to himself run for Sheriff. But when the county needed an Interim Sheriff, Botchie reasoned that he knew the job, knew being Interim Sheriff would not hurt his career, and knew it would save the County money. So he expressed his willingness to serve in that temporary position.

When Botchie discussed it with them, the legislators claimed to have no role in the process, so Botchie let the matter drop. Later, Botchie saw the same legislators taking credit for O'Dowd's selection. Both assertions could not be true: either the legislators were involved, and told Botchie they were not, or they were not involved, and improperly took credit before O'Dowd. This concerned Botchie, and affected his confidence in the Party.

Botchie's speech has been held to have constitutional protection. Although during the conversation Botchie made no comments about O'Dowd, O'Dowd believed Botchie's conversation threatened his chances for re-election, 432 S.E.2d at 461, so he terminated Botchie. O'Dowd told Botchie that he would tell the press

that a "personality conflict" existed, and O'Dowd wrote him a letter of recommendation.

Botchie filed suit against O'Dowd and also named as a party, solely for purposes of complete relief, the state entity which governs Botchie's retirement. Botchie plead deprivation of his First Amendment rights and sought relief under 42 U.S.C. § 1983.

In his Answer O'Dowd contended he discharged Botchie for "unsatisfactory job performance." He also thought Botchie's comments about the legislators was "undermining his political career as Sheriff." 432 S.E.2d at 461.

To support the contention that Botchie was terminated for poor job performance, O'Dowd specified a particular assistant prosecutor who had

supposedly reported problems with Botchie. Botchie called that assistant as a rebuttal witness, and she denied in all respects the account given by O'Dowd, including denying having any conversation whatsoever with O'Dowd about the matter. At trial, Botchie argued that O'Dowd's explanation was a pretext to mask his retaliating against Botchie for daring to criticize the integrity of two Republican legislators.

Despite the unresolved factual conflicts, and Botchie's claim that O'Dowd's testimony was pretext, the trial court directed a verdict at the close of all the evidence. The trial court purported to take into account the contention that O'Dowd's rationale for dismissal was a pretext, but upheld the termination, contending that viewed

favorably to Botchie the only inference to be drawn was that Botchie's "speech," had a detrimental impact on his working relationship with O'Dowd.

While appeal was pending before the South Carolina Supreme Court, this Court announced its decision in Waters v. Churchill, ___ U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). The state Supreme Court affirmed directed verdict against Botchie, holding

> the trial judge properly considered all the evidence surrounding Botchie's discharge in ascertaining whether O'Dowd acted in good faith upon a reasonable belief that Botchie's speech demonstrated disloyalty or created disruption to the Sheriff's department.

456 S.E. 2d at 405-406, App. A, infra. The state court determined the second prong of Connick was satisfied, eliminating the need to present to the jury any fact issue.

Botchie sought rehearing, arguing that the record had not been construed favorably to Botchie, and that both Connick and Waters had been incorrectly applied. Rehearing was denied, and this Petition followed.

Reasons for Granting the Petition

Justice Scalia's concurring opinion in Waters v. Churchill, ___ U.S. at ___, 114 S.Ct. at 1897, 128 L.Ed.2d at ___ (1994), notes that the responsibilities of the fact-finder and the court are not clearly established when a public employee alleges his employment has been ended because he exercised a Free Speech right. That concurrence also notes, 114 S.Ct. at 1895, that constitutional adjudication without fully understanding

the facts "offends the doctrine that constitutional questions that need not be addressed should be avoided." Justice Stevens, dissenting in Waters, states that the critical issues are whether the speech was protected (a question of law), and whether it was the basis for the sanction (a question of fact). 114 S.Ct. at 1898. This appeal seeks to correct the clear error of the South Carolina Supreme Court, and in doing so to clarify the appropriate sequence for determinations of fact and law when protected speech is involved in a public employee's termination.

1. **The State Court's Analysis Precludes the Factfinder Where Facts are Disputed, Conflicts with Waters v. Churchill, And Isolates Constitutional Analysis From Fact**

Certiorari should be granted to

clarify the proper sequence for resolving necessary questions of fact when public employment is alleged to have been in retaliation for protected speech. After two trials and three appeals to the South Carolina Supreme Court, there is in this case still no determination by a fact finder as to why Botchie was fired. The jury has never been permitted to resolve a single factual question.

"[P]recise and complete findings of fact," are preferred for grappling with the "endless variety" of ways in which First Amendment issues can arise in the workplace, Rankin v. McPherson, 483 U.S. at 382 n.4, 107 S.Ct. 2896 n.4, 97 L.Ed.2d at ___ (1987). Accord, Connick v. Myers, 461 U.S. at 154, 103 S.Ct. at ___, 75 L.Ed.2d at 724-725 (1983); Pickering v. Board of Education, 391 U.S.

at 569, 88 S.Ct. at ___, 20 L.Ed.2d at 817-818 (1968); Jones v. Dodson, 727 F.2d at 1333 (4th Cir. 1984). However, as the analysis has evolved since Pickering, some dispositive issues have become identified as questions of law: for example, if the speech involved is Constitutionally protected. Whether the employee was terminated for protected speech or for a non-speech reason is acknowledged to be a question of fact, but at what point is that fact issue properly resolved? Once speech is found to be protected, the lower courts are sequencing in various ways the remaining factual and legal issues, as set forth below.

The basis of Botchie's termination is disputed. O'Dowd's explanation is claimed to be pretext, and a substantial

showing was made that it was pretext. Multiple trials, and multiple appeals, should not be needed each time such circumstances arise.

In Botchie 2, 432 S.E.2d 458, 461 (1993), the state Supreme Court reversed directed verdict because

> no evidence was offered by O'Dowd to demonstrate that Botchie's speech had a 'detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impede[d] the performance of the speaker's duties or interfere[d] with the regular operation of the enterprise.' Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 2899, 97 L.Ed.2d 315, 327 (1987).

Botchie 2, ___ S.C. at ___, 432 S.E.2d at 462, App. A, infra. O'Dowd was supposedly required to make "some showing of actual disruption or disloyalty" stemming from the protected speech. Id..

The protected speech was Botchie's comments about the Republican

legislators. On remand, there was no showing that those comments had any impact whatever in the Sheriff's office. Instead, O'Dowd testified about other things that Botchie supposedly had said about O'Dowd, all of which Botchie denied ever having said. Both the trial court and the South Carolina Supreme Court analyzed not the protected speech Botchie admits, but the pretext speech which O'Dowd claims but Botchie denies. O'Dowd's "state of mind" was deemed sufficiently pure that even though Botchie claimed O'Dowd's account was a fabrication, and pitted O'Dowd's account against Botchie's account, the Connick balancing was deemed to have been satisfied because disruption was presumed based on O'Dowd's pretext.

Construing the record favorably to

Botchie requires that O'Dowd's account be viewed as pretext. Crediting a pretext with Constitutional weight in the Connick balancing is inconsistent with that standard of review, inconsistent with Waters, inconsistent with the Sheriff's obligation under state law to avoid arbitrary action, separates completely from fact the constitutional analysis, and may or may not relate to the actual reason the Petitioner was terminated.

a. **Waters requires a factfinder where reason for discharge is disputed.**

Waters v. Churchill affirmed that the employer must reach his decisions "in good faith, rather than as a pretext." Waters, 114 S.Ct. 1878, 1889 (1994). A public employer cannot properly formulate any theory whatever for retaliating

against an employee for protected speech. Under Waters, the actual reason for termination is constitutionally insufficient if it is a pretext, and in South Carolina a public employer exceeds his authority if he acts arbitrarily. State v. Siegler, 230 S.C. 115, ___, 94 S.E. 2d 231, 235 (1956) (Governor may not use discretion arbitrarily); Dacus v. Johnston, 180 S.C. 329, ____, 185 S.E. 491, 499-500 (1936) (same); Hearon v. Calus, 178 S.C. 381, 183 S.E. 13, 21 (1935) (same). As with other aspects of First Amendment law, the reason for an employee's termination must be reasonable. E.g., Connick v. Myers, 461 U.S. 138, 154, 75 L.Ed.2d 708, 724 (1983) (employer may act on speech reasonably believed disruptive); Pickering v. Board of Education, 391 U.S. 563, 571, 20

L.Ed.2d 811, 819 (1968) (unreasonable to regard speech as per se detrimental to workplace); Torres v. Aponte Roque, 831 F.2d 26, 28 (1st Cir. 1987) (factfinder entitled to disregard unreasonable reasons for discharge); Marciello v. Sumner, 973 F.2d 295, 299 (4th Cir. 1992), cert.den. sub nom. Marciello v. City of Lancaster, ___ U.S. ___, 113 S.Ct. 1048, 122 L.Ed.2d 356 (1993) ("no reasonable trier of fact could conclude. . . ."); Joyner v. Lancaster, 815 F.2d 20, 24 (4th Cir. 1987) (employer must "reasonably apprehend" actual disruption); Tribe, American Constitutional Law, Sec. 12-5, p. 818-819 (2d Ed. 1988) (legitimate purpose cannot be a sham).

Waters does not permit the employer to invent the reasons for discharge.

Waters, at 114 S.Ct. 1889. When a discharge is alleged to have been in retaliation for protected speech, and the dismissal rationale is claimed to have been a pretext, the factfinder must resolve the competing claims about the actual reason for termination. Determining, as required by Waters, whether the employer's conduct was reasonable, given the information available, is for the finder of fact, not for the Court. 114 S.Ct. at 1891. And directed verdict is no more appropriate than was summary judgment in Waters.

The state court has erred, and the error will remain the law of South Carolina unless the Petition is granted. The state court has failed to articulate the basis for its Connick analysis, has erroneously performed Connick balancing

not on the protected speech but as to the "speech" denied by the Petitioner and claimed to be pretext, 456 S.E.2d at 405, App. A, infra, and allocated to the trial court the task which Waters allocates to the fact-finder: determining whether the employer "acted in good faith upon the facts as they were reasonably found to be." 456 S.E.2d at 405. Waters reversed summary judgment and remanded because "a reasonable factfinder" (emphasis added) could determine that the employee had been fired for non-disruptive speech. 114 S.Ct. at 1891. The case was remanded for that determination, and only after actual cause for termination was established by the fact-finder was the trial court to determine whether the speech for which the employee fired was Constitutionally protected. Id..

Botchie's speech was protected, but we do not know if he was terminated for that speech or for the reasons Botchie claims are pretext. Connick balancing can not yet be performed unless it is performed on the protected speech, under the presumption that the protected speech was the basis of the termination. Waters v. Churchill, 114 S.Ct. 1878, 1891 (1994) (Connick balancing applied to the speech for which the employee was fired). To uphold directed verdict without knowing whether the actual reason for discharge was the protected speech requires, under Waters, a finding that a reasonable factfinder could not determine that Botchie was discharged for that protected speech and could reasonably find only that his discharge was for either poor job performance, which is disputed, or

for making comments, which are denied, about O'Dowd's fitness to serve. No such showing has been made or can be made.

b. No deference is due this employment decision.

A public employer who advances a pretext to justify punishing speech cannot have reached its employment decision "reasonably" or in "good faith." Waters, 114 S.Ct. at 1889. Nor has he honored state limits not to exercise his authority arbitrarily. Acting on pretext is "outside the range of what a reasonable manager would use." 114 S.Ct. at 1889. And there are present none of the factors from Waters which support deferring to the employer's decision. O'Dowd was not relying on either "past similar conduct," Waters at ___ U.S. ___,

114 S.Ct. 1888, 128 L.Ed.2d ___, or "personal knowledge of people's credibility." Id. He does not know who he spoke to, other than the individual Botchie conversed with, and O'Dowd purports to know nothing of that person's credibility. No evidence was offered to prove the truth of what the Sheriff supposedly was told, or to establish the reliability of any "sources." O'Dowd has no personal experience or personal knowledge of credibility or past actions of those he supposedly relied upon, as noted in Waters at ___ U.S. ___, 114 S.Ct. 1888, 128 L.Ed.2d ___

2. Lower courts are uncertain how to sequence the fact inquiries and legal issues.

Since Waters was announced, cases have arranged in various ways the

necessary inquiries. The Third Circuit approved submitting part of the analysis to the jury, with the Court repeating the analysis for its own conclusion. Feldman v. Philadelphia Housing Authority, 43 F.3d 823, 831 (3rd Cir. 1994) (jury asked to find if speech protected, then Court considered the same question). The Seventh Circuit has held that once the court determines whether the speech is protected, "the jury was to determine the defendants' motivation" in terminating the employee. Marshall v. Porter County Plan Com'n, 32 F.2d 1215, 1220 (7th Cir. 1994) (upholding Connick balancing before submitting the case to the jury but instructing them to find for the employee if speech was the reason for

termination[3]). The Tenth Circuit has held that a conclusory opinion without findings of fact or reasoning is insufficient for Connick balancing, and must be remanded. Schiller v. Moore, 30 F.3d 1281, 1284 (10th Cir. 1994) (fact

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3 Although it decides constitutional questions hypothetically, Marshall's balancing is consistent with Waters, as different factual possibilities were balanced and the jury instructed which party must win depending on their determination, 32 F.3d at 1220. The Seventh Circuit explicitly recognizes that Connick balancing is to be applied only to the speech for which the employee was disciplined. Wright v. Illinois Dept. Children & Family Services, 40 F.3d 1492, 1499 (7th Cir. 1994). Botchie 3 excludes the jury completely.

finding is "primary function," in the analysis). Id.

By contrast, South Carolina applies Connick balancing to a pretext discharge rationale, without knowing the actual reason for discharge. The South Carolina approach is too much deference to the "facts as the employer thought them to be." Waters at 114 S.Ct. 1889. When compared with prior decisions of this Court and decisions of other Courts of Appeal, the South Carolina decision constitutes significant error both procedurally and substantively, and certiorari should be granted to clarify the proper sequence and correct the error. E.g., Limbach v. Hooven & Allison Co., at 466 U.S. 362; 104 S.Ct. 1843, 80 L.Ed.2d ___ (1984); Hudson v. Louisiana, at 450 U.S. 42, 101 S.C. 971, 67 L.Ed.2d

___ (1981); William E Arnold Co. v. Carpenters District Council, at 417 U.S. 14, 94 S.Ct. 2071, 40 L.Ed.2d ___ (1974); Pittsburgh v. Alco Parking Corp., at 417 U.S. 371-372, 94 S.Ct. 2293-2294, 41 L.Ed.2d ___ (1974). If the decision is permitted to stand, public employment may be conditioned upon sacrifice of important constitutional freedoms.

3. The Questions Presented are Important

Free speech on public issues occupies the highest rung of First Amendment values. E.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, 102 S.Ct. 3409, ___, 73 L.Ed 2d 1215, ___ (1982). The South Carolina decision renders those freedoms susceptible to erosion by invention, as a pretext is now deemed sufficient to

penalize an exercise of speech rights even though the speech has created no disruption whatever in the public workplace.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

Gregg Meyers
Wise & Cole, P.A.
P.O. Drawer O
Charleston, S.C. 29402
803/727-2200
Counsel of Record for
Petitioner

N. Steven Steinert
15 Broad Street
Charleston, S.C. 29401
803/723-1199

July, 1995

Appendix A

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

Thomas G. Botchie, Appellant,

v.

Michael O'Dowd, the Sheriff of Charleston County, and the Retirement Division of the State of South Carolina Budget and Control Board, Respondents.

Appeal From Charleston County

Paul E. Short, Jr., Judge

Opinion No. 24222

Heard February 7, 1995 - Filed April 3, 1995

AFFIRMED

Gregg Meyers, of Wise & Cole, P. A.; and N. Steven Steinert, both of Charleston, for Appellant.

Thomas S. Tisdale, Stephen P. Groves, Stephen L. Brown and Elizabeth Barone Luzuriaga, all of Young, Clement, Rivers & Tisdale, of Charleston, for Respondent.

CHANDLER: This is the third appeal of Botchie v. O'Dowd. [FOOTNOTE #1: Botchie v. O'Dowd, 299 S.C 329, S.E.2d 727 (1989) (Botchie I); Botchie v. O'Dowd, ___ S.C. ___, 432 S.E.2d 458 (1993) (Botchie II). END FOOTNOTE].

In this appeal, the trial judge granted O'Dowd's motion for directed verdict on Botchie's cause of action for alleged wrongful discharge in violation of his Constitutional right of free speech. [FOOTNOTE #2: U. S. Const. amend. I; S. C. Const. art. I § 2. END FOOTNOTE] We affirm.

FACTS

Reference is had to Botchie II, in which the essential facts are identical to those in the record before us in this appeal.

ISSUE

The sole issue here is whether the Circuit Court erred in granting O'Dowd's motion for directed verdict.

SCOPE OF REVIEW

"On review of an order granting a directed verdict, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party against whom the verdict was directed. A jury issue exists where the evidence is susceptible of more than one reasonable inference." Jones v. Ridgely Communications, Inc., 302 S.C. 452, 454, 405 S.E.2d 402 (1991).

DISCUSSION

Three tests have been adopted by federal decisions for determining whether the discharge of a public employee for speech activity violates the First

Amendment. Initially, the trial court must apply the two-prong balancing test enunciated in the seminal case of Connick v. Myers. [FOOTNOTE #3: 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). END FOOTNOTE] The first prong of the Connick test requires a finding by the court that the employee's speech activity implicates a matter of public concern. [FOOTNOTE #4: In Botchie II we determined that prong one was satisfied. END FOOTNOTE] If such a finding be reached, the second prong is invoked and requires that the court balance the government's countervailing interest in fulfilling its responsibility effectively and efficiently. After applying the Connick test, if it be determined that the employee's First Amendment right to free speech is outweighed by the governmental interest,

the governmental interest prevails, prong two is satisfied, and the analysis concludes. However, if it be determined that the employee's right to free speech outweighs the governmental interest, an issue of fact for the jury is thereby created. In such event, the burden is then upon the employee to establish that the protected speech was a substantial or motivating factor in the discharge. The employer may show by a preponderance of the evidence that the employee would have been terminated irrespective of the protected activity. See Waters v. Churchill, ___ U.S. ___, 114 S.Ct. 1878 (1994); Connick v. Myers, supra; O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993) cert denied sub nom., Town of Nahant, Massachusetts v. O'Connor, ___ U.S. ___, 114 S.Ct. 634 (1993).

When applying the Connick test the trial court must determine from the employer's conduct whether he acted in good faith upon the facts as they were reasonably found to be. Waters v. Churchill, 114 S.Ct. at 1889. A great deference to the employer's judgment is allowed when close working relationships are essential to fulfilling public responsibilities. Connick v. Myers, 461 U.S. at 150. Further, the character of the employment relationship should be considered; and free speech rights of employees in police departments should be evaluated in a more limited context. Jurgensen v. Fairfax County, Virginia, 745 F.2d 868, 880 (4th Cir. 1984) (Police departments are "paramilitary organizations" and the free speech rights of employees in police departments must

be evaluated with the special character of the organization in mind).

In Botchie II, we specifically remanded this matter for a determination by the trial court as to whether Botchie's speech caused some disruption or indicated disloyalty detrimentally affecting the operation of the Sheriff's department. At trial O'Dowd presented evidence verifying that he reasonably believed Botchie had uttered disloyal comments undermining his standing with the public and damaging his ability to operate the Sheriff's Department. Speech should not be considered in a vacuum, since the manner, time and place of the expression are relevant, as is the context in which the dispute arose. Connick v. Myers, 103 S.Ct. at 1693. We find that the trial judge properly

considered all the evidence surrounding Botchie's discharge in ascertaining whether O'Dowd acted in good faith upon a reasonable belief that Botchie's speech demonstrated disloyalty or created disruption to the Sheriff's Department.

We agree with the trial court's conclusion that Botchie's free speech rights were outweighed by O'Dowd's interest in effectively managing the Sheriffs Department. Since the second prong of the Connick test was satisfied, no issue of fact for the jury was created and directed verdict was properly granted.

AFFIRMED. FINNEY, TOAL, MOORE and WALLER concur.

Appendix B

THE SUPREME COURT OF SOUTH CAROLINA

April 19, 1995

Gregg Meyers, Esquire
PO Drawer 0
Charleston, SC 29402

Re: Thomas G. Botchie v. Michael O'Dowd

Dear Mr. Meyers:

The following Order has been endorsed on your Petition for Rehearing in the above entitled case on appeal.

"Petition for Rehearing is denied.

s/Ernest A. Finney, Jr., C.J.

s/Jean Toal, A.J.

James E. Moore, A.J.

John H. Waller, Jr., A.J.

A. Lee Chandler, A.A.J.

April 19, 1995."

Please be advised that the remittitur in this matter is today being forwarded to the Clerk of Court for

Charleston County.

Very truly yours,

s/ Clyde N. Davis

CLERK

CND,Jr./mcw

Copy to: The Honorable Julie Armstrong
N. Steven Steinert, Esquire
Thomas S, Tisdale, Jr., Esquire
Stephen P. Groves, Esquire
Elizabeth Barone Luzuriaga, Esquire
Stephen L. Brown, Esquire

Appendix C

Order of the Trial Court, issued from the bench, in the trial transcript of the last trial at pages 266-267):

THE COURT: All right, after having carefully considered the matter, this Court finds that the Plaintiff's speech as alleged in this case set out through the testimony and evidence was of both public concern and of public concern to the Plaintiff and was entitled to a limited first amendment protection.

Viewing the evidence in the light most favorable to the Plaintiff, however, I find the only inference which can be drawn from the testimony and evidence is that the Plaintiff's speech did have a detrimental impact on his close working relationship with the Sheriff, the Defendant, and that a close working

relationship between the Sheriff and the Plaintiff as the UnderSheriff was essential in an orderly administration of his duties as Sheriff of Charleston County.

I further conclude that applying the balancing test that the Defendant's interest in maintaining an orderly administration was outweighed by the free expression -- by the Plaintiff's free speech rights.

Therefore, I am going to direct a verdict for the Defendant.

Anything further, sir?

Bring the jury in, please.

(Jury returned to Courtroom at 3:05 P.M.).

(Jury panel excused by the Court.)

MR. MEYERS: I understand your ruling, your Honor. Does the Court then

presume that in fact that was the reason for Mr. Botchie's termination, the speech activity?

THE COURT: I think that's what culminated it, Mr. Meyers. I think there was a disruption once the Defendant was appointed Sheriff other than the Plaintiff, and there were other incidences -- the testimony in my mind demonstrated clearly that there was a personality conflict between the Plaintiff and the Defendant before the Defendant was appointed Sheriff and that this just culminated in the fact that when he made his expression or his speech and this was the final straw, so to speak.

It did have a detrimental impact on the close working relationship that was absolutely required between the Sheriff

and his number one man.

MR. MEYERS: I'm sure the Court is taking into consideration our position that all of that was pretextural and not the real reason.

THE COURT: Yes, sir, I understand that.

Supreme Court, U.S.
FILED
AUG 7 1995
OFFICE OF THE CLERK

(2)

No. 95-77

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

THOMAS BOTCHIE,

Petitioner,

V.

MICHAEL O'DOWD; AL CANNON, individually and in his official capacity as the SHERIFF OF CHARLESTON COUNTY; and the RETIREMENT DIVISION OF THE STATE OF SOUTH CAROLINA BUDGET AND CONTROL BOARD,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas S. Tisdale, Jr., Esquire
Counsel of Record
Stephen P. Groves, Esquire
Elizabeth B. Luzuriaga, Esquire
Stephen L. Brown, Esquire
YOUNG, CLEMENT, RIVERS & TISDALE, L.L.P.
28 Broad Street, Post Office Box 993
Charleston, South Carolina 29402
(803) 724-6688

Counsel for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

40 pp

QUESTION PRESENTED

Whether a public law enforcement employee may properly maintain a claim for wrongful termination associated with speech which is entitled to limited First Amendment protection when there is evidence that the employee's speech and actions actually disrupted the public employment.

LIST OF PARTIES

Petitioner, Thomas G. Botchie, is a resident and citizen of the State of South Carolina.

Respondent, Michael O'Dowd, is a resident and citizen of the State of Georgia, however, was formerly the Sheriff of Charleston County, South Carolina.

Respondent, Retirement Division of the State of South Carolina State Budget and Control Board, is a political agency of the State of South Carolina.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 3

STATEMENT OF THE CASE 4

SUMMARY OF THE ARGUMENT 11

REASONS FOR DENYING THE WRIT 11

THE SOUTH CAROLINA SUPREME COURT PROPERLY APPLIED THIS COURT'S FIRST AMENDMENT BALANCING TEST FROM *CONNICK V. MYERS* TO DETERMINE THAT O'DOWD'S INTERESTS IN MAINTAINING AN ORDERLY AND EFFICIENT SHERIFF'S DEPARTMENT OUTWEIGHED BOTCHIE'S FREE SPEECH RIGHTS 11

A. Two-Prong Balancing Test . . 12

B. Evidence Of Disruption . . . 15

C. Employee's Rights vs. Employer's Rights 18

1. Employment As Law Enforcement Officer . . 20

D. Analysis Not Undertaken In A Vacuum 22

1. Destruction of Trusting Relationship . 23
2. Problems Within the Sheriff's Department . 24

A TRIAL COURT CORRECTLY APPLIES THE *CONNICK* BALANCING TEST BEFORE ALLOWING THE JURY TO DETERMINE ANY ISSUES OF FACT RELATING TO CAUSATION 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

Allen v. Fidelity Deposit Co. of Maryland, 515 F. Supp. 1185 (D.S.C. 1981), affirmed, 694 F.2d 716 (4th Cir. 1982). 4

Beard v. Alexandria, 341 U.S. 622 (1951) 12

Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985), cert. denied, 476 U.S. 1159 (1986) 19

Botchie v. O'Dowd, 299 S.C. 329, 384 S.E.2d 727 (1989) 4, 5, 7-9

Botchie v. O'Dowd, ___ S.C. ___, 458 S.E.2d 458 (1993) 12, 13, 15, 17, 27

Botchie v. O'Dowd, ___ S.C. ___, 456 S.E.2d 403 (1995) . . 10, 14, 17, 22, 23

Connick v. Myers, 461 U.S. 138 (1983). . . . 11-13, 16-20, 22, 23, 27-31

Dwyer v. Smith, 867 F.2d 184 (4th Cir. 1989) 29

Gasparinetti v. Kerr, 568 F.2d 311 (3d Cir. 1977) 20

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 14, 22

Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1983), cert. denied, 465 U.S. 1023 (1984) 21

Joyner v. Lancaster, 815 F.2d 20 (4th Cir. 1987) cert. denied, 484 U.S. 830 (1987) 16, 19, 24, 27, 29

Jurgensen v. Fairfax County, Virginia, 745 F.2d 868 (4th Cir. 1984) 14, 19, 20, 27

Kannisto v. City and County of San Francisco, 541 F.2d 841 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977) . . 20

Kelly v. Johnson, 425 U.S. 238 (1976) 21

Kenna v. United States Department of Justice, 727 F. Supp. 64 (D.N.H. 1989) 14, 26, 27

Maciaereillo v. Sumner, 973 F.2d 295 (4th Cir. 1992) 21

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) 14, 17

O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993), cert. denied sub nom., Town of Nahant, Massachusetts v. O'Connor, ___ U.S. ___, 114 S. Ct. 634 (1993) 19

Pickering v. Board of Education, 391 U.S. 563 (1968) 12, 17, 19

Pierson v. Gondles, 693 F. Supp. 408 (E.D. Va. 1988) 24, 26

Rankin v. McPherson, 483 U.S. 378 (1987) 15, 17, 21, 22, 26

Stroman v. Colleton County School District, 981 F.2d 152 (4th Cir. 1993) 26

Thomas G. Botchie v. Michael O'Dowd, the Sheriff of Charleston County, and the Retirement Division of the State of South Carolina Budget and Control Board, ___ S.C. ___, 432 S.E.2d 458 (1993) . . . 4, 6-10, 12, 13, 15-18, 27

Town of Nahant, Massachusetts v. O'Connor, ___ U.S. ___, 114 S. Ct. 634 (1993) 19

Willis v. Aiken County, 203 S.C. 96, 26 S.E.2d 313 (1943) 4

RULES AND REGULATIONS

28 U.S.C. § 1257(a) 3

Rule 25(d)(1), SCRCP 8

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

THOMAS G. BOTCHIE,
Petitioner,

-versus-

MICHAEL O'DOWD; AL CANNON, individually and in his official capacity as the SHERIFF OF CHARLESTON COUNTY; and the RETIREMENT DIVISION OF THE STATE OF SOUTH CAROLINA BUDGET AND CONTROL BOARD,
Respondents.

On Petition for Writ of Certiorari to the South Carolina Supreme Court

---

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents, Michael O'Dowd and the Retirement Division of the State of South Carolina Budget and Control Board,

respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Thomas G. Botchie.

OPINIONS BELOW

The South Carolina Supreme Court affirmed the trial court's directed verdict in favor of O'Dowd and the Board rejecting Botchie's claims that his termination as Undersheriff violated his free speech rights under the First Amendment. The court's opinion is reported in 456 S.E.2d 403 and is reproduced in Appendix A to Botchie's Petition for Certiorari. (App. A, 38-45).

Following the South Carolina Supreme Court's issuance of the opinion, Botchie moved for a rehearing. The court denied that Petition on April 19, 1995. The court's denial is reproduced in Appendix B

to Botchie's Petition for Certiorari. (App. B, 46-47).

The oral order of the trial judge directing a verdict for O'Dowd and the Board at the conclusion of all of the evidence was not published. That order, however, was transcribed, and is reproduced in Appendix C to Botchie's Petition for Certiorari. (App. C, 48-51).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) in that the appeal is from a final judgment rendered by the highest court of the State of South Carolina and involves the Petitioner's rights under the United States Constitution.

STATEMENT OF THE CASE

In late February 1986, the late Honorable Charles F. Dawley hired Botchie as Undersheriff with the Charleston County Sheriff's Department (the "Sheriff's Department"). This employment commenced under a Letter of Appointment which provided that Botchie would serve as Undersheriff[1] "at the pleasure of the Sheriff."

Botchie began his law enforcement career while in the United States Air Force. In 1967, he moved into a civilian

---

[1] The terms "'undersheriff' and 'deputy sheriff' are essentially synonymous positions under South Carolina common law." Botchie v. O'Dowd, 299 S.C. 329, 330 n. 1, 384 S.E.2d 727, 728 n. 1 (1989) ("Botchie I") (citing Allen v. Fidelity Deposit Co. of Maryland, 515 F. Supp. 1185 (D.S.C. 1981), affirmed, 694 F.2d 716 (4th Cir. 1982); Willis v. Aiken County, 203 S.C. 96, 26 S.E.2d 313 (1943)). See also, Botchie v. O'Dowd, ___ S.C. ___, ___, 432 S.E.2d 458, 459 n.4 (1993) ("Botchie II").

law enforcement career with the Charleston County Police Department (the "CCPD") eventually advancing to the rank of lieutenant.[2] During his tenure as a lieutenant he supervised patrol officers, including O'Dowd.[3]

In 1980 Botchie returned to USAF active duty until he retired in 1986. He then returned to CCPD, however, left after only one (1) week to accept the position of Undersheriff under Sheriff Dawley. As Undersheriff, Botchie supervised all of the Sheriff's Department's divisions including more than thirty (30) people.

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[2] Botchie simultaneously served in the USAF reserves.

[3] See, Botchie I, 299 S.C. 329, 330, 384 S.E.2d 727, 728. Botchie, although the issue was contested, consistently maintained that he had suspended O'Dowd on two (2) separate occasions for abusing the CCPD's sick-leave policies.

In November 1987, when Sheriff Dawley died,[4] O'Dowd was appointed to serve as Sheriff.[5] As was customarily done, O'Dowd re-appointed all of his incoming deputies, except Botchie.

Shortly after Sheriff Dawley died, Botchie spoke with South Carolina State Senators Glenn McConnell and Sherry Martschink (the "Senators") regarding his desire to serve as Interim Sheriff.[6] The Senators advised Botchie that they had nothing to do with the eventual appointment, as it was entirely in Governor Campbell's hands.[7] After O'Dowd was appointed Sheriff, Botchie came to

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[4] See Id.; Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 459.

[5] See, Id.; Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 459.

[6] Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 459.

[7] Id.

doubt the Senators' truthfulness and, in fact, suspected that they had politically assisted O'Dowd to become Sheriff.[8] Botchie had, in fact, lost faith in the Senators.[9]

After O'Dowd was sworn in, Botchie expressed his displeasure with the Senators' veracity to Jackie Steen ("Steen"), an officer in the local Charleston, South Carolina Republican Party.[10] The contents of that conversation eventually made its way back to, at least, O'Dowd and possibly to the Senators. On December 2, 1987, O'Dowd

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[8] Id., ___ S.C. ___, ___, 432 S.E.2d 458, 459-460.

[9] Botchie I, 299 S.C. 329, 331; 384 S.E.2d 727, 728.

[10] Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 459-460.

terminated Botchie[11] and the Council denied Botchie's post-termination request for a hearing.[12]

After the termination, Botchie sued O'Dowd,[13] individually and in his official capacity as Sheriff of Charleston County, South Carolina for, inter alia, intentional violation of civil rights and wrongful discharge.[14] O'Dowd was granted summary judgment and Botchie appealed.

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[11] Botchie I, 299 S.C. 329, 330, 384 S.E.2d 727, 728; Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 460.

[12] Id., Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 460.

[13] The Respondents are collectively referenced through O'Dowd.

[14] The Defendants, Charleston County Council (the "Council") and the Retirement Division of the State Budget and Control Board (the "Board"), were added as necessary parties in the Amended Complaint. The Honorable J. Alton Cannon, Jr. ("Sheriff Cannon") was also added as a necessary party when he succeeded O'Dowd as Charleston County Sheriff. See, Rule 25(d)(1), SCRCP.

The South Carolina Supreme Court affirmed in part and reversed in part.[15] The Supreme Court affirmed dismissal of the Council,[16] however, reversed dismissal of O'Dowd and the Board.[17]

On remand, Botchie filed a Second Amended Complaint. In January 1992, his case went to trial before a jury. When Botchie rested, the Trial Judge directed a verdict for O'Dowd. Botchie again appealed and the South Carolina Supreme Court affirmed in part and reversed in part.[18] The Supreme Court upheld the directed verdicts on the implied contract

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[15] See, Botchie I, 299 S.C. 329, 384 S.E.2d 727 (1989).

[16] Id., 299 S.C. 329, 333-334, 384 S.E.2d 727, 729-730.

[17] Id., 299 S.C. 329, 331-333, 384 S.E.2d 727, 729.

[18] See Botchie II, ___ S.C. ___, 432 S.E.2d 458 (1993).

and defamation causes of action,[19] however, remanded for a trial on the retaliatory discharge and First Amendment counts.[20]

In January 1994, another jury heard Botchie's remaining claims. At the conclusion of the entire case, the Trial Judge directed a verdict for O'Dowd. Botchie appealed and the South Carolina Supreme Court affirmed the directed verdict.[21] The Supreme Court denied his Petition for Rehearing and this Petition for Writ of Certiorari followed.

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[19] Id., ___ S.C. ___, ___, 432 S.E.2d 458, 460-461.

[20] Id., ___ S.C. ___, ___, 432 S.E.2d 458, 461-462.

[21] Botchie v. O'Dowd, ___ S.C. ___, 456 S.E.2d 403 (1995) ("Botchie III").

SUMMARY OF THE ARGUMENT

The South Carolina Supreme Court properly affirmed the trial court's directed verdict on Botchie's claims. The evidence overwhelmingly indicated that Botchie's speech and actions caused actual disruption in the Charleston County Sheriff's Department.

REASONS FOR DENYING THE WRIT

THE SOUTH CAROLINA SUPREME COURT PROPERLY APPLIED THIS COURT'S FIRST AMENDMENT BALANCING TEST FROM *CONNICK V. MYERS* TO DETERMINE THAT O'DOWD'S INTERESTS IN MAINTAINING AN ORDERLY AND EFFICIENT SHERIFF'S DEPARTMENT OUTWEIGHED BOTCHIE'S FREE SPEECH RIGHTS.

The South Carolina Supreme Court correctly applied this Court's balancing test from Connick v. Myers, 461 U.S. 138 (1983), to affirm the Trial Court's directed verdict to O'Dowd. The evidence presented during the trial demonstrated

that Botchie's actions disrupted the activities of the Sheriff's Department. O'Dowd was entitled to a directed verdict. See, Botchie v. O'Dowd, ___ S.C. ___, ___, 432 S.E.2d 458, 462 (1993) ("Botchie II").

The First Amendment's guarantee of free speech is not absolute. Beard v. Alexandria, 341 U.S. 622, 642 (1951). This is particularly true for public employees, as "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulating the speech of its citizenry in general." Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

A. Two-Prong Balancing Test

In Botchie II, the South Carolina Supreme Court noted that this Court, in Connick, established a two-prong test for

determining when the discharge of a public employee for speech activity violated the First Amendment. The threshold issues are:

(1) Does the speech implicate a matter of public concern?

(2) If so, does Employer's interest in the effective and efficient fulfillment of its responsibilities to the public outweigh the Employee's interest in free speech?

Botchie II, ___ S.C. ____, ____, 432 S.E.2d 458, 461 (citing Connick, 461 U.S. 138, 142). The South Carolina Court determined that "Botchie's speech regarding Republicans, being both of public concern and of personal concern to Botchie, was entitled to limited First Amendment protection." Id.

While the First Amendment applies to public employees, "it does not insulate the employee from disciplinary action by the employer for statements unrelated to

matters of public concern that affect the conduct of the employer's business." Kenna v. United States Department of Justice, 727 F. Supp. 64, 69 (D.N.H. 1989). If the employee is able to demonstrate both of these threshold requirements, then he must also present evidence that his engaging in the protected activity was the motivating or "but for" cause of his discharge. See, Jurgensen v. Fairfax County, Virginia, 745 F.2d 868, 880 (4th Cir. 1984); Botchie III, ___ S.C. ___, ___, 456 S.E.2d 403, 405. This requirement has been authoritatively established. See, Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Givhan v. Western Line Consolidated School District, 439 U.S. 410, 417 (1979).

B. Evidence Of Disruption

In Botchie II, the South Carolina Supreme Court reversed O'Dowd's directed verdict granted to O'Dowd since the only evidence presented was Botchie's testimony and certain deposition testimony.[22] Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 461-462. There had been

> no evidence . . . offered by O'Dowd to demonstrate that Botchie's speech had a 'detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impede[d] the performance of the speakers duties or interfere[d] with the regular operation of the enterprise.'

Id., ___ S.C. ___, ___, 432 S.E.2d 458, 462 (citing Rankin v. McPherson, 483 U.S. 378, 388 (1987)).

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[22] The deponent, Melvin Simmons, a former Sheriff's Department deputy, died prior to either trial. See, Botchie II, ___ S.C. ___, ___, 432 S.E.2d 458, 461-462.

Even though "it was not necessary that O'Dowd 'allow events to unfold to the extent that the disruption of the office and the destruction of working relationships [was] manifest . . .'" Id. (quoting Connick, 461 U.S. 138, 152), O'Dowd was required to make "some showing of actual disruption or disloyalty was required." Id. (Emphasis in original).[23]

O'Dowd testified in the second trial and the record was replete with evidence that O'Dowd "believed [that] Botchie had uttered disloyal comments undermining his

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[23] Botchie II held that Botchie's statements regarding the Senators was entitled to limited Constitutional protection. Id., ___ S.C. ___, ___, 432 S.E.2d 458, 461. This is consistent with the position that, to the extent a public employee's expression is in furtherance of matters of personal concern, the public employee's burden of showing the predominance of the public interest in continuing the efficient functioning of a public entity is lessened. See, Joyner v. Lancaster, 815 F.2d 20, 24 (4th Cir. 1987) cert. denied, 484 U.S. 830 (1987).

standing with the public and damaging his ability to operate the Sheriff's Department. Botchie III, ___ S.C. ___, ___, 456 S.E.2d 403, 405. Certainly, the South Carolina Supreme Court's decision to affirm the directed verdict for O'Dowd was proper, since Botchie could not satisfy Connick's threshold requirements.

The application of the Connick analysis, applicable herein by Botchie II, has been[24] continuously refined. In Rankin, 483 U.S. 378, and in Mt. Healthy, 429 U.S. 274, this Court reiterated and refined the Connick analysis. Botchie had the initial burden to demonstrate that his conduct and speech were constitutionally protected. See, Mt. Healthy, 429 U.S. 274, 287. In Botchie II, the South

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[24] The Connick analysis is a reiteration of the balance test first set forth in Pickering, 391 U.S. 563.

Carolina Supreme Court said Botchie's speech was entitled to "limited First Amendment protection." Id., ___ S.C. ___, ___, 432 S.E.2d 458, 461.

C. Employee's Rights vs. Employer's Rights

The trial court and, indeed, the South Carolina Supreme Court, were required to balance the competing interests and rights of the employee (i.e., Botchie) against those of the employer (i.e., O'Dowd). Connick, 461 U.S. 138, 150. A court must:

> balance the strength of the employee's First Amendment interest, and any parallel public interest in the information which the employee sought to impart, against the strength of the countervailing governmental interest in promoting efficient performance of the public service the government agency or entity must provide through its employees.

O'Connor v. Steeves, 994 F.2d 905, 912 (1st Cir. 1993), cert. denied sub nom., Town of Nahant, Massachusetts v. O'Connor, ___ U.S. ___, 114 S. Ct. 634 (1993) (citing Pickering, 391 U.S. 563, 568). The resolution of this critical issue is a matter of law for a judge to decide, and not an issue of fact. See, Connick, 461 U.S. 138, 150 n.7; Joyner v. Lancaster, 815 F.2d 20, 23 (4th Cir. 1987) cert. denied, 484 U.S. 830 (1987); Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985), cert. denied, 476 U.S. 1159 (1986). The Pickering balance analysis espoused by this Court in Connick requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the pu blic. Id. (Emphasis added).

1. Employment As Law Enforcement Officer

Moreover, the type of employment in issue directly bears on the amount of weight an employee's rights are to be given under the Connick analysis. Courts consistently acknowledge that police officers have more limited First Amendment rights in their employment than do other public employees. Jurgensen, 745 F.2d 868, 880. Freedoms are often denied police officers due to the discipline demanded of them by their profession. Id. (citing Kannisto v. City and County of San Francisco, 541 F.2d 841, 843 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977) (emphasizing police department's interest in discipline, *esprit de corps*, and uniformity); Gasparinetti v. Kerr, 568 F.2d 311, 321 (3d Cir. 1977) (Rosen, J., dissenting in part), cert. denied, 430 U.S. 931 (1977) ("police forces are a

para-military force.")). See also, Maciaereillo v. Sumner, 973 F.2d 295, 300 (4th Cir. 1992) (citing Hughes v. Whitmer, 714 F.2d 1407, 1408 (8th Cir. 1983), cert. denied, 465 U.S. 1023 (1984); Kelly v. Johnson, 425 U.S. 238 (1976)). There is "greater latitude . . . afforded to [law enforcement] department officials in dealing with dissention in their ranks." Maciaereillo, 973 F.2d 295, 300 (citing Hughes, 714 F.2d 1407, 1419).

In addition, the courts pay close attention to the type of position held by the public employee. Where an employee "serves no confidential, policy making, or public contact role, the danger to the agency's successful functioning from the employee's private speech is minimal." Rankin, 483 U.S. 378, 390-391. Conversely, where the employee holds a confidential, policymaking, or public

contact role, the danger to the agency's successful function by the employee's speech is much greater. Botchie's position as Undersheriff undeniably fit into the latter category and was an important consideration for the South Carolina Supreme Court in trying to reach the proper balance of the competing interests at stake.

D. Analysis Not Undertaken In A Vacuum

Importantly, "[i]n performing the balancing [analysis], the statement[s made by the employee] will not be considered in a vacuum; the manner, time and place of the employee's expression are relevant, as is the context in which the dispute arose." Rankin, 483 U.S. 378, 388. See, Givhan, 439 U.S. 410, 415 n.4; Botchie III, ___ S.C. ___. ___, 456 S.E.2d 403, 405 (citing Connick, 461 U.S. 138, 152-

154). Finally, "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Connick, 461 U.S. 138, 150. (Emphasis added).

In this case, the South Carolina Supreme Court found that

> the [T]rial [J]udge properly considered all of the evidence surrounding Botchie's discharge in ascertaining whether O'Dowd acted in good faith upon a reasonable belief that Botchie's speech demonstrated disloyalty or created disruptions to the Sheriff's Department.

Botchie III, ___ S.C. ___, ___, 456 S.E.2d 403, 405-406.

1. Destruction of Trusting Relationship

It is imperative that the Sheriff and Undersheriff have a close, harmonious, trustful working relationship in order for the Sheriff's Department to function

effectively. See, Joyner, 815 F.2d 20, 24 (discussing the importance of mutual loyalty and confidence between a sheriff and former captain in sheriff's department). See also, Pierson v. Gondles, 693 F. Supp. 408 (E.D. Va. 1988). That was not the case between O'Dowd and Botchie. O'Dowd, himself, best described the reason he terminated Botchie from his position as Undersheriff:

> Because I was convinced in my heart that Tom [Botchie] was doing whatever he could to make sure I did not get re-elected (sic). He was telling people I was unqualified for the job. He was telling people I should not have gotten the appointment, and this was the man representing the Sheriff's Department when I'm not there. There was no working relationship. I did not trust him . . .

2. Problems Within the Sheriff's Department

In addition, the strained relationship between Botchie and O'Dowd

"created a very divisive atmosphere within the [Sheriff's] [D]epartment because people did not know where they stood or what they should do or who they should listen to or what was going on." Botchie reportedly became enraged when Governor Campbell appointed O'Dowd as Sheriff and threw furniture around the main office of the Sheriff's Department. All of this conduct culminated in "causing a number of personal frictions in the office." Officials and employees within the Sheriff's Department were unsure where to turn, as the second-in-command openly questioned O'Dowd's ability to serve as Sheriff.

Where continuous criticism erodes the relationship between a superior and his subordinates, the First Amendment will not insulate the employee "from the consequences of his continuing

intransigence." Kenna, 727 F. Supp. 64, 73. See also Pierson, 693 F. Supp. 408, 413.

As this Court noted in Rankin, 483 U.S. 378, 388, this balancing analysis cannot be performed in a vacuum, but must be considered in light of the surrounding facts and circumstances. See also, Stroman v. Colleton County School District, 981 F.2d 152 (4th Cir. 1993) (court should not divide overall speech into discrete components to conduct a constitutional analysis on each). In Kenna, 727 F. Supp. 64, the District Court noted that:

> Situations of this type rarely involve a single statement. More commonly, they involve multiple utterances made over a period of time and on a variety of subjects. Furthermore, they are frequently difficult to characterize and relating exclusively to matters of public concern or private interest . . . . In essence, what is

> required is a case-by-case approach in which close calls must sometimes be made.

Id., 727 F. Supp. 64, 70.

It is axiomatic that when the top two ranking officials in the Sheriff's Department cannot work together because of distrust and disloyalty, some disruption to the department is, at best, inherently bound to occur. Joyner, 815 F.2d 20, 23-24; Jurgensen, 745 F.2d 868, 880-882. As the South Carolina Supreme Court noted in Botchie II, "it was not necessary that O'Dowd 'allow events to unfold to the extent that the disruption of the office and the destruction of working relationships was manifest' . . ." Id., ___ S.C. ___, ___, 432 S.E.2d 458, 462 (citing Connick, 461 U.S. 138, 152).

O'Dowd was only required to show some disruption within the Sheriff's Department and he complied with that requirement.

The South Carolina Supreme Court's affirmation of the Trial Court's directed verdict should be affirmed. Botchie's Petition for Writ of Certiorari should be denied.

A TRIAL COURT CORRECTLY APPLIES THE CONNICK BALANCING TEST BEFORE ALLOWING THE JURY TO DETERMINE ANY ISSUES OF FACT RELATING TO CAUSATION

The two (2) underlying threshold issues in the Connick balancing test are to be determined by the court, and not the jury. Id., 461 U.S. 138. If the court concludes that either one of these requirements has not been satisfied, then the inquiry ends and there is no issue for a jury to consider. In order to avoid the directed verdict on his First Amendment claim, Botchie had to establish a *prima facie* case of a violation by showing that he engaged in protected speech or activity

and that the speech or activity was a substantial factor in the resulting action.

It is evident that Connick and its progeny have all envisioned the trial court making these primary findings before allowing the case to go to the jury. See, Dwyer v. Smith, 867 F.2d 184, 193 (4th Cir. 1989). The Fourth Circuit has held that the jury has no role to play whatsoever in trying to assist the court in determining the proper balance under Connick. See, Joyner, 815 F.2d 20, 23.

To adopt Botchie's proposed First Amendment analysis, courts would regularly allow cases to go to a jury for determination regardless of the fact that the trial court is required to rule as a matter of law on the first two requirements under Connick. This would lead to confusion and to an unnecessary

number of trials being held under the ambit of the First Amendment.

Botchie asserts that the trial court could weigh O'Dowd's purported justifications for his termination without factual findings by the jury only if there was no dispute about why Botchie was fired. It is well established that the weighing or balancing process required by Connick should be performed by Judge Short prior to the case being submitted to a jury.

The Trial Court, and the South Carolina Supreme Court, correctly applied the Connick balancing test to this case. Botchie's argument that Judge Short should have first submitted the case to the jury for factual determination is meritless. Regardless of the jury's conclusions, the Trial Court, when assessing the balance as a matter of law, would be forced to grant

judgment to O'Dowd for the very same reason that it directed a verdict for him at trial. Regardless of the approach taken, the result would be the same. Botchie cannot and has not presented sufficient evidence to pass Connick's threshold requirements. Botchie failed to prove that his free speech rights outweighed O'Dowd's interests in maintaining an efficient and harmonious operation at the Sheriff's Department. Botchie's arguments that "but for" causation had to first be decided by a jury is incorrect.

CONCLUSION

O'Dowd and the Board prays that this Court deny Botchie's Petition for Writ of Certiorari, because the case presents no issue appropriate for the Court's review,

and because the lower court's holding was not in error.

Respectfully submitted,

YOUNG, CLEMENT, RIVERS &
TISDALE, L.L.P.
Stephen P. Groves, Esquire
Thomas S. Tisdale, Esquire
Elizabeth B. Luzuriaga, Esquire
Stephen L. Brown, Esquire
28 Broad Street, P. O. Box 993
Charleston, SC 29402
(803) 577-4000
Attorneys for the Respondents

Charleston, South Carolina
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